

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

**C. Rev. No.155/1999
C/W
CIA No.115/1999
C. Rev. No.69/2007**

Date of decision: **09.06.2014**

State of J&K & anr

Vs.

Mukhtar-ul-Aziz & anr

Coram:-

***Hon'ble Mr. Justice Mohammad
Yaqoob Mir, Judge***

Appearing counsel:-

For the Petitioner(s): Mr. S. A. Naik, AAG.

For the Respondent(s): None.

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| i) | Whether to be reported
in Digest/Journal: | YES |
| ii) | Whether to be reported
in Press/Media: | YES/NO/OPTIONAL |

1. This revision petition is directed against the order dated 23rd August, 1999 passed by the Court of 4th Additional District Judge, Srinagar, in terms whereof, application seeking Condonation of delay as well as application seeking setting aside of exparte decree, has been dismissed. Learned trial court while dismissing the said applications has opined that lenient view could be taken for condoning the delay but there is no merit in the

application seeking setting aside of the exparte decree.

2. Order IX Rule 13 of the Code of Civil Procedure envisages following two alternate grounds for setting aside exparte decree:

- (1) if the aggrieved party satisfies the court that the summon was not duly served, or
- (2) the party was prevented by any sufficient cause from appearing when the case was called on for hearing.

The petitioners in the application seeking setting aside of the exparte decree have projected only one ground i.e. summon was not duly served upon the petitioners. Perusal of the trial court record reveals that the suit has been instituted on 14.06.1993, on behalf of defendant No.3(respondent No.2 herein) Rashid Ahmad, Manager Personnel, had appeared on 28.06.1993 whereas on behalf of defendants 1 and 2(petitioners herein), summon issued was received back. Report of the process server has been recorded to the effect that the summon has been effected on them based on which

they were proceeded in ex-parte. Later on defendant No.3 was represented and then on 12.12.1994 on behalf of defendants 1 and 2(petitioners herein) Advocate had appeared who had filed application along with an affidavit for setting aside exparte proceedings. Then on 15.03.1995, no one appeared on behalf defendants 1 and 2, the application for setting aside exparte proceedings was dismissed in default.

3. On 08.08.1995, again Advocate has appeared on behalf of defendants 1 and 2 with an application for restoration of application seeking setting aside of the exparte proceedings. He has also remained present before the trial court on 19.09.1995. In short, interim orders recorded by the trial court would reveal that the defendant No.3(respondent No.2 herein) had also filed written statement whereas there has been appearance on behalf of petitioners as well. In the said backdrop, the ground projected that the summon was not duly served upon them pales into insignificance. Under such circumstance, the only ground available to the petitioners was to project that they were prevented

by any sufficient cause from appearing, which has not been projected in the application at all.

4. It appears that the petitioners and respondent No.2, figuring as defendants in the suit, have in a clandestine manner arrayed defendant No.3 as respondent No.2 herein so as to claim non-service of the summon but their entire stand is negated by the interim orders recorded on the trial court file.

5. Trial court noticing all the features has rightly opined that lenient view could be taken for condoning the delay but there is no merit in the application seeking setting aside of the exparte decree. The view taken by the trial court is absolutely in consonance with law.

6. The petitioners including respondent No.2, in order to shield their act of indolence in defending the suit have tried to project a theory of non-service of summon but same is exposed by the records as they have been appearing before the trial court all along.

7. The trial court has passed the order impugned in accordance with law, same does not suffer from

any irregularity nor is to cause any miscarriage of justice.

8. Revision petition being without merit is dismissed. No order as to costs.

9. Trial court record be sent back forthwith along with copy of this order.

CIA No.115/199;

Appearance as above;

1. Pursuant to order dated 23rd August, 1999, passed by the Court of 4th Additional District Judge, Srinagar, application seeking Condonation of delay in preferring the application for setting aside of exparte decree has been dismissed. In the said order it has been observed that lenient view could be taken for condoning the delay but application seeking setting aside of the exparte decree being without merit, delay not condoned and application seeking setting aside of exparte decree is also rejected.

2. As against the said order, Civil Revision No.115/1999 has been filed on 19.11.1999. Side by side instant appeal has also been filed under Order

43 CPC against the same order on the same date i.e. 19.11.1999 with the prayer that the said order dismissing the application for Condonation of delay may be set aside.

3. It appears that for safeguarding the interests of the appellants/petitioners two alternate remedies have been availed as against the same order dated 23rd August, 1999. Since by the said order application for Condonation of delay has been rejected, as against that order remedy of appeal is not available whereas against the order rejecting application seeking setting aside of ex parte decree under Rule 13 Order 9 CPC is appealable under Order 43 CPC, that is why instant appeal has also been filed.

4. Since it is concluded that no merit has been found in the application seeking setting aside of the ex parte decree, therefore, there is no scope for success of this appeal which is also, accordingly, dismissed, leaving it open to the appellant to work out other remedies as shall be otherwise available for challenging the judgment and decree.

C. Rev. No.69/2007;

Appearance as above;

Be de-linked and listed separately in the week commencing 30th June, 2014 in the regular cause list.

Mir)

Srinagar
09.06.2014
"Mohammad Altaf"

(Mohammad

Yaqoob

Judge